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Supreme Court, U.S.
FILED
MAR 11 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1835

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

On Writ of Certiorari to the
Court of Appeal of the State of California,
Second Appellate District, Division Seven

REPLY BRIEF

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INTRODUCTION

Respondent argues in his brief that he had a reasonable expectation of privacy with respect to his garbage after he had placed it in the communal trash bin, and that therefore he cannot be deemed, for Fourth Amendment purposes, to have abandoned it.[1/] His argument has been essentially anticipated in all its salient aspects in our opening brief and in the briefs *amici curiae* submitted by the State of California *et al.* and the Americans for Effective Law Enforcement, Inc. *et al.* We shall, nevertheless, discuss a few matters raised by respondent and in the *amicus curiae* brief submitted by the California Public Defenders Association.

Before we proceed to do so, we first briefly point out how respondent's effort to establish his position involves him in serious

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1. Respondent's brief asserts that the police officers found a closed brown paper bag. (See, e.g., pp. 4, 6, 8, 9, 11.) However, the search warrant affidavit merely refers to a "brown paper shopping bag" without indicating whether it was open or not. (JA 21.) Although the record is silent on this point, we are willing to assume that the bag was closed for the sake of argument.

analytical difficulties. He initially claims that papers in a garbage container "are not abandoned in the reasonable expectation of privacy sense." (Brief of Respondent, p. 12.) This position is in harmony with the holding in People v. Krivda, 5 Cal.3d 357, 95 Cal.Rptr. 62, 468 P.2d 689 (1971) (vacated and remanded sub. nom. California v. Krivda, 409 U.S. 33 (1972) and reissued 8 Cal.3d 623, 105 Cal.Rptr. 521, 504 P.2d 457 (1973)) that a reasonable expectation of privacy existed with respect to trash contained in sacks within the well of the refuse collectors' truck after these sacks had been removed from defendants' trash cans. But respondent also inconsistently maintains that "the contents [of a garbage container] achieve their [constitutional] protection derivatively by virtue of being within the key protected garbage can." (Brief of Respondent, p. 13.) This contention is, however, inconsistent with the Krivda holding that a reasonable expectation of privacy can pertain to a person's trash after it has been removed from his container

by trash collectors. Fatal to the contention that trash is only derivatively protected by virtue of being within a person's trash container is the doctrine, implicitly held by this Court, that a search warrant is not required with respect to a container which does not support a reasonable expectation of privacy with respect to its contents. (Texas v. Brown, 460 U.S. 730 (1983); Arkansas v. Sanders, 442 U.S. 733, 764 n. 13 (1979); United States v. Ross, 456 U.S. 798, 814 n. 19 (1982).) Perhaps it is respondent's inconsistent position about whether there is a per se reasonable expectation of privacy with respect to the contents of a trash container that explains why he is ambivalent as to whether a search warrant is required to search a trash container, given probable cause, because of its mobility. (Brief of Respondent, pp. 10-11.)

ARGUMENT

THE FOURTH AMENDMENT DOES NOT COMPEL A STATE TO ADOPT AN EXCLUSIONARY RULE AS A SANCTION FOR A VIOLATION OF AN EXPECTATION OF PRIVACY DEEMED UNREASONABLE UPON INDEPENDENT STATE GROUNDS

Respondent contends that he had a Fourth Amendment right with respect to his garbage in the communal trash bin because he, "being a California citizen, had an already heightened, established, judicially determined reasonable expectation of privacy in his garbage." (Brief of Respondent, p. 8.) Respondent urges that "[t]his existing law governed the illegal seizure of his garbage from the communal trash bin of the subterranean garage of his apartment and any change in that law must be non-retroactive as to respondent." (Ibid.)[2/]

The amicus curiae brief of the California Public Defenders Association similarly urges

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2. Respondent essentially repeats this contention at pages 41-42 of his brief.

that suppression of evidence is mandated under the Fourth Amendment if evidence is illegally seized in violation of state law and in violation of an expectation of privacy which is deemed reasonable by state law.

These contentions are made seemingly unmindful that this Court has already spoken on the matter.

In Cooper v. California, 386 U.S. 58 (1967), this Court explained that its holding, that the warrantless examination of a car validly held by officers for use as evidence in a forfeiture proceeding was not unreasonable,

> does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so. And when such state standards alone have been violated, the State is free, without review by us, to apply its own state harmless-error rule to such errors of state law. There being no

> federal constitutional error here, there is no need for us to determine whether the lower court properly applied its state harmless-error rule.

(Id. at 62. Fn. omitted.) Since a state having such higher standards is free to apply its own harmless-error rule as to violations of such standards, it must a fortiori also be free to not have a rule providing sanctions for violations of such standards.

The California Supreme Court candidly recognized the impact of the adoption of the "truth-in-evidence" provision of the California Constitution (Cal.Const., art.I, §28(d)), when it explained in In re Lance W., 37 Cal.3d 873, 886-887, 210 Cal.Rptr. 631, 694 P.2d 744, 752 (1985):

> What would have been an unlawful search or seizure in this state before the passage of that initiative would be unlawful today, and this is so even if it would pass muster under the federal Constitution. What

> Proposition 8 does is to eliminate a judicially created remedy for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled.

The argument that violations of reasonable-expectation-of-privacy standards based solely upon independent state grounds are ipso facto violations of federal reasonable-expectation-of-privacy standards is clearly semantic legerdemain which, it should be noted, was not even raised in the courts below in the the instant case.

The brief of the California Public Defenders Association presents a concatenation of contentions in support of their position. We consider them briefly in turn.

First, pages 7-8 of that brief rely upon quotations from Katz v. United States, 389 U.S. 347, 350-351 (1967) and Rakas v. Illinois, 439 U.S. 128, 143-144 n. 12 (1978) for the

proposition that this "Court's reference to property law in conjunction with society's 'understandings' points to state law as the logical source for such law because property law is viewed as a preserve of the states." But these cases do not even come close to showing that the Fourth Amendment somehow incorporates a state's higher reasonable-expectation-of-privacy standards, albeit that such standards are not required by the federal Constitution. Nor is this argument buttressed by references to Board of Regents v. Roth, 408 U.S. 564 (1972) and Paul v. Davis, 424 U.S. 693 (1976). These cases simply assert that the procedural safeguards of federal due process apply to liberty and property interests which exist by virtue of State law.

Next, amicus contends, at page 10 of its brief, that the application of local or state standards for the determination of what is obscene as a matter of federal constitutional law supports the contention that the Fourth Amendment incorporates a state's higher reasonable-of-expectation-of-privacy standards.

But this Court's explanation of the matter does not help amicus. In Miller v. California, 413 U.S. 15, 30 (1973) this Court stated:

> Under a national Constitution, fundamental First Amendment limitations on the power of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.

Finally, in further support of its thesis, amicus notes at page 10 of its brief that "[t]his Court has often specifically referred to state law to determine the validity of arrests made by state and federal

officers. ([Citations].)" Even assuming arguendo that this statement is not open to question or qualification[3/], it does not tend to support the position of amicus. Consideration of these matters relates only to issues as to what does or does not constitute a reasonable invasion of privacy interests already determined to be reasonable. On the other hand, determination of what is or is not a reasonable expectation of privacy under the Fourth Amendment necessarily does not involve issues pertaining to the validity of arrests, searches, seizures or entries by law enforcement officers.

Ultimately, the essence of the contention made by respondent and the California Public Defenders Association is that when a state characterizes a particular expectation

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3. For example, Professor Wayne F. LaFave states: "There thus would appear to be no Fourth Amendment barrier to a state court holding, as a few have, that the exclusionary rule will not be utilized to deter violation of state statutory provisions limiting warrantless arrests." (2 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2d ed. 1987) § 5.1(c), p. 405, fn. omitted.)

of privacy as reasonable based solely upon independent state grounds, that expectation of privacy must also be characterized as reasonable as a matter of federal constitutional law. The reductio ad absurdem of this position, as we see it, is that every violation of a state search-and-seizure constitutional provision is automatically a violation of the federal Constitution. But this result would be inconsistent with the doctrine that a state cannot purport to be applying the Fourth Amendment to invalidate a search when it insists on a more demanding standard under its own Constitution or statutes. (New Jersey v. T.L.O., 469 U.S. 325, 343 n. 10 (1985).)

CONCLUSION

Respondent has failed to show that the test of abandonment for Fourth Amendment purposes is based upon the reasonable expectation of privacy doctrine. Moreover, in the sense used by this Court, respondent did not have a reasonable expectation of privacy with respect to the garbage within the communal trash bin,

assuming arguendo that its contents were his effects within the meaning of the Fourth Amendment.

For the reasons set forth in this and in our opening brief, we urge this Court to hold that there is no Fourth Amendment interest in trash once that trash has been set outside a person's residence for collection by the trash collector. A home may be a person's castle but once that person's effects have been placed outside the castle for collection, they constitute abandoned property for the purposes of the Fourth Amendment.

Respectfully submitted,

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